United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1011

To be argued by
PHYLIS SKLOOT BAMBERGER

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

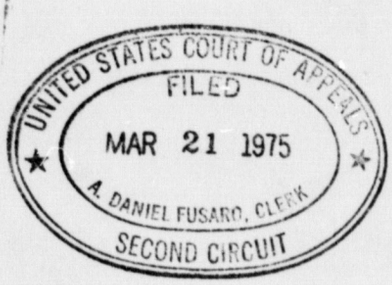
ALPHONSE M. MEROLLA
and THOMAS McNAMARA,

Appellants.

Docket No. 75-1011

BRIEF FOR APPELLANT
ALPHONSE M. MEROLLA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ALPHONSE M. MEROLLA
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

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QUESTIONS PRESENTED

1. Whether the District Judge improperly removed the issue of causation from the jury's consideration, resulting in a violation of due process.

2. Whether the Government failed to prove appellant's guilt beyond a reasonable doubt, and therefore whether it was error to deny the motion to acquit.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable John F. Dooling, Jr.) entered on January 3, 1975, convicting appellant Alphonse M. Merolla, after a trial before a jury, of one count of conspiracy to delay, obstruct, and affect interstate commerce, in violation of 18 U.S.C. §1951.

Appellant was sentenced, pursuant to 18 U.S.C. §3651, to a term of imprisonment for three years, three months of the term to be served in an institution and execution of the remainder of the sentence to be suspended, and to a five-year term of probation.

The District Court granted leave to appeal in forma pauperis, and this Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Charges and the Prosecution's Theory of the Case

In an indictment brought by the Special Task Force, the Government charged that Thomas McNamara and Alphonse M. Merolla

(hereinafter called appellant) had conspired with others named to obstruct, delay, or affect interstate commerce by extorting certain property and property rights from Harold ("Harry") Goberman. The indictment alleged that Goberman and his company, HarMac Construction Company, had contracted with McNamara to build for McNamara a new facility for the sale and repair of automobiles. It further alleged that from June 1, 1972, through the date of the indictment, McNamara, appellant, and the others named in the indictment had conspired to obstruct, delay, and affect interstate commerce by using extortion on June 5 and 28, 1972, to cause Goberman to give up $1,300, title to a construction trailer, and his right to construct the McNamara facility.*

The Government's theory of how this conduct delayed, obstructed, or affected interstate commerce was that there was interference with construction of a building being built with materials shipped in interstate commerce and not incorporated into the building between June 1 and 28, and that the completed building was to sell automobile parts to be shipped in interstate commerce (127**).*** The defense theory was that it was other events, and not the defendants' conduct, which affected the construction (see infra at 21-26).

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*The indictment is "B" to appellant's separate appendix.

**Numerals in parentheses refer to pages of the transcript of the trial.

***The charges here were initially filed on May 2, 1973. At that time the indictment named John DeLiso, John McNamara, Thomas McNamara, appellant, Rocco Merolla, and Angelo Merolla. A trial was held on that indictment from January 7 to January 24, 1974. At the conclusion of that trial, Angelo and Rocco

B. The Evidence Produced at Trial*

1. The Contract is Signed and Work Begins

Thomas McNamara owned, and with his sons operated, McNamara Buick-Pontiac, a franchised General Motors automobile dealership opened in the 1950's (1617). A corporation known as McNamara New-Cars was formed for the purpose of owning a newly-acquired piece of property** (1619-1620, 1655), on which was to be built a new showroom and service facility for McNamara Buick-Pontiac.

Merolla were acquitted, and the jury could not reach a verdict as to the other defendants (see minutes of January 24, 1974, at 2178, Document #48 to the record on appeal). John DeLiso, appellant, and Thomas McNamara were then re-tried, and Alphonse Merolla, not to be confused with appellant, was added as a defendant.

The indictment named John McNamara, Thomas McNamara's son, as a defendant. However, on the day the trial was to begin, with a jury panel waiting to be called (58), the special prosecutor announced that he intended to call John McNamara as a witness for the Government and had, on the prior day, sought permission to grant him testimonial immunity (59-60). The prosecutor requested that John McNamara's case be severed. After substantial colloquy, which included expressions of surprise at the Government's conduct, the motion was granted when defense counsel agreed to the severance (110-111). The District Court denied the Government's request for an adjournment, and ordered the trial to proceed (114). Immunity was not granted, and John McNamara was not called as a witness.

Prior to trial, Judge Dooling ruled that objections made by one counsel would be treated as applying to all defendants (120).

*The evidence in this case came almost entirely from government witnesses, whose testimony on cross-examination was critical to the defense position. Since the testimony helpful to the defense was irrelevant to a finding of guilt on the theory ruled appropriate by the Court and presented to the jury, there is no basis for concluding that the jury rejected this testimony. Thus, the uncontradicted testimony is presented as a narrative.

**This property, located at 5184 Nesconsett-Port Jefferson Highway, will hereinafter be called the site.

In July or August 1971 (263) Harold Goberman was employed by LenAl (261, 1217), a construction firm run by his brother, Allen Goberman,* and Allen's wife, Helen (261, 1216), which was building a new Mercury-Lincoln showroom (1217) near the new McNamara site. McNamara met Goberman at the Lincoln-Mercury site (262).

Goberman, who at times misrepresented himself as an officer of LenAl (262), began, in the name of LenAl (549), three months of negotiations with McNamara to build the new McNamara showroom. On February 4, 1972, Goberman submitted a bid on LenAl letterhead stating, "We propose to construct ... for $382,000" (552). Goberman also accepted bids from subcontractors in the name of LenAl (554). Allen Goberman believed that Goberman was negotiating with McNamara on behalf of LenAl (1219, 1274), and indeed, prior to signing the contract, Goberman did land stripping on the site (267) with equipment borrowed from LenAl (268).

Despite Goberman's representation to the contrary, he got the contract for himself** (264), and it was signed and dated February 24, 1972 (266; Government Exhibit #11).*** Goberman later formed his own corporation, HarMac Construction Company,

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*Throughout this brief Harold Goberman will be referred to as Goberman; Allen Goberman will be referred to by his full name.

**Goberman testified that he completed the negotiations in his own name.

***Under the contract, work was to be completed by August 31, 1972. References to other specific provisions of the contract will be made where relevant.

and assigned his rights under the contract to that corporation (266, 1218).

Goberman then proceeded to obtain proposals and bids for materials to be used in the project from firms doing business in interstate commerce, and did so in the name of LenAl (186, 198, 203, 1558).* In employing workers for the project, Goberman initially represented himself as LenAl. Kenneth Brown, a laborer on the construction site for about three months, was told by Goberman that he was hired by LenAl (1807), and James Freda, who operated heavy equipment on the site, was similarly told by Goberman that he was an employee of LenAl (1814).

On March 15, 1972, with part of $13,700 McNamara had advanced to him (278) before the first requisition on the contract went through (276),** Goberman purchased a trailer for the construction site (270) for $1,500.

At some later time, Goberman advised some of his suppliers and subcontractors of the change in the deal from LenAl to Har-Mac and Goberman (204, 206, 1558). However, Allen Goberman testified that LenAl received bills from subcontractors working the site, and when LenAl received such bills, they billed McNamara (1283) despite the fact that LenAl's only participation was to help Goberman clear land and to lend him some carpenters (1282).

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*The salesman of the steel for the project was one Thaddeus Lemanski (212), who was also engineer on the job (see Government Exhibit #11).

**Goberman testified that he repaid this money in May 1972 (279).

Goberman himself testified that two subcontractors billed LenAl for their services, although he paid the others (573).

Salvatore Spatsarella was seen around the construction site with Goberman on three occasions in April 1972 (1591-1592).* Goberman knew Sparsarella as a racketeer (614, 663), and believed at the time of trial that Spatsarella was in prison. On a contract with Goberman, Spatsarella supplied refuse bins for the construction site (664).

2. Harold Goberman

Throughout this initial period, McNamara was unaware of Goberman's background and history. In fact, Goberman had two prior criminal convictions -- one in 1957 for grand larceny, and one in 1964 for theft of goods in interstate commerce which involved an armed hijacking (259). Further, Goberman was a prime suspect in a murder case (1589, 1609, 1612), although he had been given immunity by Suffolk County to testify for the prosecution in that case (People v. Sommers).** Suffolk County

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*This testimony was given by Thomas Gill, a Suffolk County policeman involved in the investigation of a murder case in which Goberman had been a prime suspect (1589, 1609, 1612).

**The testimony given by Goberman in the trial of that case was summarized for the jury by Judge Dooling. The thrust of the testimony was that Goberman had participated with another person in planning the violent murder of the victim by running him over with a car. At first the scheme failed, but was successful in a subsequent attempt. Throughout it all, Goberman testified, he did not plan to carry out the scheme (382-391).

police knew Goberman was armed (1700), and considered him dangerous (1606).

Similarly, McNamara was not aware that Goberman used a number of aliases (260) and had both pilot's and driver's licenses under assumed names (430, 458). Goberman also used false names and Social Security numbers to get jobs (430).

Further, according to Goberman himself, he would lie, even under oath (373),* and he had pretended to be mentally ill to avoid a court appearance (498).

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*Aside from feeling it was permissible to lie to get a job, Goberman said he would lie under oath unless that oath were administered in a courtroom by a judge or clerk (601). He felt there was a difference between testimony given in a courtroom and testimony given by deposition (601-603):

> [DEFENSE COUNSEL:] There are different kinds of Oaths, is that right.
> [GOBERMAN:] That is correct.
> Q For different occasions?
> A No, sir, in a courtroom it's perjury if you lie.
> Q Is that the only reason you don't lie, because it's perjury?
> A No, because now it's in a courtroom in front of people, and you do not lie in a courtroom.
> Q But you can lie elsewhere?
> A That is correct.
> Q Even when you are under Oath?
> A To me, the only Oath that counts is in a courtroom.
> Q Otherwise you will Swear falsely any place, if it isn't in a courtroom?
> A No, sir, that is wrong.
>
> (602).

He later included within the scope of an oath he could respect the oath taken before a grand jury (768-769).

When faced with numerous significant inconsistencies between his trial testimony and testimony he had given before the grand jury and at the earlier trial, as well as his sworn statements made in support of his $1,600,000-lawsuit brought against

McNamara was also not aware that Goberman owed large personal debts: $5,000 to his lawyer (1515); $150,000 in various business debts (433); and alimony ( ). By court order, Goberman was to pay his ex-wife $7,000 on June 8, 1972, or face the loss of a piece of property he owned (632).

3. The Troubles Start

By the beginning of May, 1972, conflict arose between Goberman and McNamara. McNamara was complaining that Goberman was not paying the subcontractors, and Goberman was annoyed that McNamara seemed to be taking over the job (1544).* These same complaints continued intc June (1191, 1192).** Goberman admitted that in May he started slowing down the construction and assigned fewer men to the job (575).

James Freda, whom Goberman had hired as a laborer, testified at trial, describing his work:

> [I did work on steel beams. I was welding] mostly mistakes.

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the defendants in this case (739), Goberman explained them as merely failures of memory, exaggerations, or mistakes. See, e.g., 417, 440-441, 460, 747, 751, 755, 765-766, 769, 774, 776, 793-799, 800, 620, 622, 624. Goberman admitted he would sign any document prepared by a lawyer (560).

*This testimony came from Emanuel Sfaelos, the lawyer who represented Goberman in the contract negotiations (1501). Sfaelos was at the same time representing McNamara in the transaction for the purchase of the land (1507).

**This testimony came from Desmond O'Sullivan, McNamara's attorney.

... [T]he beams were put up by ironworkers, they would be short, the beams were resting on face breaks, which has no strength at all, and I would add on the steel so that they would go into the bury wall.

(1816).

Freda also explained the problems connected with installing the exhaust system:

Well, I remember I was running the back hoe at the time, and it was digging a hole to lay the pipe down.

Q And while you were doing that, did you have occasion to be present at a conversation between Mr. Thomas McNamara and Mr. Harry Goberman?

A Yes, sir.

Q And can you recall what was said in that conversation by the parties?

A Well, when it came to the end of the pipes, I needed a riser to go up on the sand, and it wasn't there, so Mr. McNamara asked Harry where the pipe was, and Harry kept on stalling, saying it's coming, and this went back and forth several times, and there were angry words, you know, and Harry said he would bury Mr. McNamara in the hole that I had dug.

Q In the hole that you had dug?

A Right.

(1817).

Then Freda described the inadequacies of the concrete being poured near the service entrance to the building:

The concrete was very soupy, which is, you know, not good for it, and there was a lot of traffic going to go.

(1818).

At this time Freda observed an argument between McNamara and Goberman, at the end of which Goberman spat at McNamara (1818).

Eugene Brosi, a moonlighting Suffolk County policeman, was hired by Goberman as a watchman at the site (1825). He testified that just prior to pouring the building, Goberman and McNamara had an argument, after which Goberman said, "I should have -- I am going to finish the old bastard. I'll hit him in the head with a pipe" (1826-1827).* Brosi also testified:

> One time, just before we were going to pour the floor of the building and the roof was leaking, and if you are going to pour cement and the roof is leaking, well, it drips on the cement and ruins the finish. We went up to investigate why it was leaking, and we found the puddle was in the middle of the roof instead of dripping over, offside, which would show that it was lower on the side, so it would run off the side, and it wasn't, and they talked about it, they argued about it for awhile, and Mr. Goberman came up with the suggestion that he would put an interior roof drain at the low point in the roof so the water would run down through a pipe into the building and out the side walls through the upper ceiling, an inner pipe to alleviate the problem of the water laying on the roof.
>
> As we were leaving the roof after this was mutually agreed on, Mr. McNamara descended first on the ladder and he was backing down and was about halfway down and Mr. Goberman said, "I should have pushed the old fuck, that would solve everything."
>
> (1827).**

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*Brosi reported the threats to McNamara only after June 20, when Brosi learned that Goberman was considered dangerous and had been involved in the Suffolk County murder case (1832).

**These threats were also heard by John Sini (1670).

As to financial matters, the evidence showed that McNamara had lent Goberman $1,700 for the May 16 payroll, to be repaid upon receipt of the second requisition (653).*

During the latter part of May 1972, McNamara's son James met Detective Gill. James asked Gill his opinion of Goberman, and Gill indicated that he believed Goberman to be dangerous (1606).

On May 25, 1972, in the midst of the problems, Goberman hired Gary Taibbi as construction superintendent at the site (287, 860).** Some time after May 25, a man who called himself Al Merolla*** came to the construction trailer and asked if the building were going up according to plans and specifications (864-865), saying they could never reach Goberman to get the information (865) so they would come to Taibbi (866).

On June 2, McNamara complained of the way Taibbi was pouring cement, saying that he was not doing it properly (862). Taibbi told him to mind his own business (862).

Later on June 2 McNamara was sitting in a car at the site when six other men approached. According to Taibbi, one who identified himself as Al Merolla complained about Taibbi's treat-

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*Article 6 of the contract (Government Exhibit #11) provided for payments to be made on or about the tenth day of each month, based on requisitions for payment made by the contractors.

**He had been preceded by James Freda and Izzy Goberman.

***Taibbi never identified appellant as this man, and based on this factor, counsel objected to the admission of this testimony (853; see 874).

ment of McNamara, saying:

> ... "We don't want you to give the old man any more fucking lip. We don't want you to argue with him any more. You listen to him, don't give him any more shit." Words to that effect. "If you do, we're going to come looking after your ass. We know where you live."
>
> (863).

By early June construction was behind schedule (1205), and the building had a huge crack in the front wall (1202), a large structual steel beam pushing out the front wall, cracks in the cinderblocks and terracotta, and a sagging roof which created a drainage problem and required revision of the drainage system (1208).

4. Events of June 5

On June 5, the man who called himself Al Merolla came to the construction site looking for Goberman, and had Taibbi telephone him (288, 867). Goberman came to the site (289), talked with appellant and DeLiso (291), and left with them, telling Taibbi everything would be all right (869). Appellant said:

> "You got problems on this job. You better get them straightened out.... We're 25% owners and we're connected .... We're Colombo [(291-292)].... You better call your rabbi [(296-297)].

Goberman called Spatsarella to meet with later that day (297-298).

At that meeting, held in a restaurant, Goberman said payments were behind schedule (300). Appellant said he guaranteed

them (300). Appellant asked Goberman to leave the table, and when he returned, a second meeting was set at another restaurant for a little later (302).

At the second meeting Goberman met appellant, DeLiso, Alphonse Merolla, two others,* and Spatsarella (305, 307). Again Goberman was told to get the job straightened out, and again he said he had no money. Appellant then threatened Goberman (307). Spatsarella left (308). Appellant told Goberman to go back to the job site. Goberman did so. There he received a telephone call telling him to go to McNamara's office (310, 1220).

Goberman picked up his brother, Allen, at LenAl, and proceeded to McNamara's office. Present were Thomas McNamara,** John DeLiso (1226), Alphonse ("Fat Nicky") Merolla, and appellant (1227, 311, 312). There was a heated discussion during which Goberman was told to finish the job and stop fooling around (625). The men present asked why Goberman had not paid the bills, and Goberman replied he had got the money (313, 1231). Allen Goberman was asked to call one of the subcontractors, a plumber, who said he was not coming back on the job if he did not get paid.

At some point McNamara tried to kick Goberman, who punched McNamara (1270). According to Goberman, he was pushed into a chair (1270) and kicked and threatened (313), and a gun was

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*Rocco and Angelo Merolla were the two acquitted at the earlier trial.

**Allen Goberman called him "John McNamara, Sr."

passed between two men.*

Allen Goberman, who had been asked to leave the room (312, 1231), testified that although he could not see what was happening,** he heard a commotion, chairs being knocked down, slapping around, cursing, and threats to kill (1233).

Goberman then signed a check for $1,300 drawn on his bank account (314) and transferred registration of the construction trailer (317, 1258, 823, 825, 839).***

Goberman testified that on June 5 -- the day of these alleged events -- McNamara lent him money to meet his payroll, and gave him a check for $32,000 (728). Significantly, he also testified that he had business dealings with appellant after June 5 (662) which had nothing to do with McNamara (728).

Some time after June 5, Goberman told Detective Gill that McNamara would be found face down in the mud if he didn't stop coming around on the job (1594).

5. Events After June 5

The disputes between Goberman and McNamara continuing, on June 7, 1972, McNamara retained (1159) Desmond J. O'Sullivan

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*Goberman testified that John DeLiso was involved. When faced with his prior testimony that DeLiso was out of the room at the time, he backtracked (798).

**This testimony was contradicted by Mrs. Tomaselli, office manager for McNamara, who said there was no door between the rooms (1758).

***The trailer remained on the site for continued use (1794-1797).

(1149), a former Assistant United States Attorney, to represent him with respect to the contract problems involving the new building (1149). McNamara believed that Goberman was not paying the subcontractors, and although McNamara was advancing money so Goberman could meet his payrolls, McNamara was concerned that the building would not be completed (1157). O'Sullivan testified that McNamara's only goal was to get the building up (1205). Thomas Gill attended the meeting and talked privately with O'Sullivan (1150), and O'Sullivan learned that Goberman was a prime suspect in a murder investigation (1184, 1610). He later informed McNamara of this fact.

Believing that Goberman was involved in some fraudulent activity, O'Sullivan asked Jack Erlich, chief of the Frauds Bureau in the Suffolk County District Attorney's office, to review the matter for possible prosecution (1153). This meeting took place on June 9, 1972 (984).

On June 8, O'Sullivan went with Thomas McNamara to deliver to Goberman a check for $2,446 (1161) to meet the payroll (638, 1160, and to arrange to examine Goberman's books.

Mr. Erlich believed there was a violation, but that it could not be successfully prosecuted. Accordingly, it was decided that no complaint would be filed, but that, as part of McNamara's objective to finish the building as soon as possible, Lemanski should be removed as architect. Attempts were made to have him dismissed, and he ultimately resigned (1211). Sfaelos (incorrectly written "Fallis" in the transcript) and Goberman

refused to consent to the appointment of a Mr. Romero as the new architect. On June 16, 1972, O'Sullivan demanded a written statement of reasonable grounds for the refusal to give approval, as was required by the contract (1212). He received no reply from Goberman from June 16 through 29 (1213).

On June 15, 1972, O'Sullivan took a check for $36,000* to Mr. Sfaelos, Goberman's attorney (1185, 1537). The money was to be held in escrow (1186) because McNamara was concerned that the moneys were not being paid to the subcontractors (1539-1540). On June 16, McNamara paid a further amount in a $32,610 check to Goberman to meet a June 1 requisition (639-640, 643).**

6. Events of June 20

On June 20, 1972, the Town of Brookhaven posted the construction site with an order*** directing that all work cease because of New York State building code violations. The particular defects in the construction were that the building could not support the weight of its proposed use. All work did cease (231-232; 858-859; 1819-1820). After that, Taibbi had no one working for him (858). He did only odd jobs, such as sweeping and scraping, just to keep busy (858). He stopped

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*This was in payment of a requisition, but in advance of the due date (1189).

**The defense introduced a series of checks showing McNamara's timely requisition payments to Goberman (649).

***The notice is reproduced as "E" to appellant's appendix.

working for Goberman altogether in early July (859, 921, 923).

John Freda, whom Goberman had hired as a laborer, stopped his construction work and became a night watchman in McNamara's employ (1819, 1820). Because of the posting by the Town of Brookhaven, the Merkel Electric Company had to remove its men from the site, and did not make installations (231-232) it had contracted to make.*

On June 24, 1972, McNamara wrote to Goberman terminating the contract under Article 14.2.1 of the contract because of breaches in the contract, failure to pay subcontractors, violation of local ordinances, and violation of Article 15.2 of the contract. Goberman received the letter of termination on June 26.**

7. Events After June 20

McNamara hired Andrew Camarua as a watchman on the site. On June 27, Taibbi came to the construction trailer and removed the file cabinets, saying they belonged to Goberman (1794-1797).

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*Delivery of the materials was made to the site (182) on April 26, 1972 (178). Installation occurred on July 27 or 28 (224, 282-283).

**The letter of June 24 was before Judge Dooling on the pre-trial motion to dismiss (see infra at 21), but was not before the jury.

8. Events of June 28

According to Goberman, on June 28 he met appellant, DeLiso, and Alphonse Merolla at a diner, and they took him to John's apartment (327). Upon their arrival, Goberman was instructed to sign a contract of release, and was told that he would be given $25,000 (328). Goberman testified that he was beaten by John McNamara, John DeLiso, Alphonse ("Fat Nicky") Merolla, and appellant. Goberman signed the release and a receipt for $25,000.*

Although Goberman testified to the severity of the beating he had suffered, he was unable to be specific about any of his injuries, saying he did not know the medical terms (464, 467, 468, 735). Further, his complaints about these injuries were contradicted by Dr. Bragio Punturo (346), the physician who had examined him on June 28. Punturo described the injuries as redness about the left leg, arm, forearm, and shoulder, with no swelling and minimal pain, for which he prescribed no medication (1115-1116, 1119).

9. Events After June 28

On June 29, 1972, Goberman wrote a letter to McNamara saying that McNamara had failed to meet the requisitions and threatening to terminate the contract (578).

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*The release is set out at pages 333-336; the receipt, at 339-340. There was an erasure on the receipt (340).

The record shows that the McNamaras had removed $20,000 from their bank account (1804); it also showed that the $25,000 consideration did not pass.

C. The Legal Issues

1. The Motion to Dismiss the Indictment

Prior to trial, counsel made a motion to dismiss the indictment,* arguing that the June 20, 1972, posting of the property by the Town of Brookhaven, as a matter of law, ended any interstate commerce so that any acts which occurred on June 28 could not have affected interstate commerce.

The Government opposed the motion, stating:

> ... As the accompanying affidavit makes clear the only force which that notice carried was to temporarily delay further construction until certain defects noted by the town inspector were corrected. While such an action would affect the course of construction it, in no way, would remove Harmac from the stream of commerce, even during the temporary diversion of construction to needed repairs.
>
> Government's Memorandum in Opposition to Defendant's Motion to Dismiss the Indictment for Want of Federal Jurisdiction, 73 Cr. 442, at 2-3.

At oral argument on the motion, defense counsel's position was that the conduct of the defendants here had no effect upon interstate commerce (22) because all construction on the site had been terminated by the June 20 posting by the Town of Brookhaven, and the contract had been terminated by letter dated June

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*Document #50 to the record on appeal.

24, 1972, from McNamara to Goberman (23).*

The Government argued that the letter of termination was not in compliance with the contract because it was not certified by an architect, and in any event would not become effective for seven days (31).**

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*Misstating the facts, the prosecutor argued that Goberman's employees and Goberman himself worked on the site until July 2 (29, 31). Taibbi's records, not in evidence, showed that Taibbi did no construction work during the relevant time, and during the last days was not even on the site. The evidence at trial is also contrary to the prosecutor's assertions.

**According to the terms of the contract, the architect was Thaddeus Lemanski. See Government Exhibit #11. Lemanski was also the salesman for the steel company which supplied the structural beams. According to the testimony of John Freda (see pages 9, 10, supra), the beams were too short and had to be welded. Defense counsel explained that Goberman had bought the defective steel through Lemanski (39).

Lemanski, who, according to the contract, was the consulting engineer and was responsible to McNamara (39, resigned on June 13, 1972 (40) when McNamara learned about the steel transaction (39). For information about the new contractor, see supra at 17.

Defense counsel also explained that thereafter a new consulting engineer advised McNamara that the supporting beams were unanchored (40-41).

Judge Dooling responded:

> No. I don't think the notice -- the Town's notice of termination has anything to do with the case. I mean, I would -- I have some familiarity with unsafe building orders and things of that sort and they always mean that you have to take the property down to the ground, unless the condition pointed out in the underlying report is remedied and remedied promptly. That's all they mean.
>
> I don't think that this one meant anything different. I understand from the evidence of the case that ultimately the structure was completed. Not by Mr. Goberman or by Harmac, but as I understand it, it was completed.
>
> (29).
>
> ... But I take it that the whole point of [the] June 28th transaction was to make a reality out of the notice of termination
>
> ... In other words, to get [Goberman] off the contract.
>
> (31-32).

The motion to dismiss the indictment was denied (41, 42).

Judge Dooling expressed the view that the facts of this case went beyond the language of the statute, and was concerned whether there was a sufficiently proximate connection with commerce, especially in light of United States v. Maze, 414 U.S. 395 (1974) (34).

The Government argued that the removal of Goberman from the job (37) and the uncompleted construction with goods which had been shipped in interstate commerce to the job site but not incorporated into the building (45) were enough to satisfy the statute. Judge Dooling summarized the Government's position:

> ... Harmac couldn't have built this new automobile store without being engaged in commerce and ... the flow of goods from these foreign supplie[r]s into the building on Nesconsett Highway is essentially a flow of commerce.... [W]hen you use a blackjack on a man to get him out of the completion of such a contract, you have interfered with that flow of commerce; right?
>
> (62).

In a written opinion,* Judge Dooling found:

> ... The notice of June 24 could not by its sending and receipt terminate the contract. Even if production of the architect's certificate was excused, the most that McNamara re-New-Cars, Inc., could do by notification would be to assert its position, as the letter plainly did. It could not unilaterally establish its assertion as the legal right of the matter. The letter was not self-fulfilling or self-executing. Hence, the transaction of June 28 was addressed to getting HarMac to relinquish the job. For all that appears, the notice sent by McNamara re New Cars, Inc., could have been an unwarranted repudiation of contract duties that was a breach -- and an element in a course of action that interfered with the HarMac performance.
>
> The town's order was, it appears, a "hold" order, requiring correction of unsafe conditions before continuing construction.

But he went on, citing United States v. Maze, supra, and United States v. Archer, 486 F.2d 670, 677-678 (2d Cir. 1973):

> The further question:
>
> whether, assuming that the construction contract itself was made in contemplation of, and if performed would have

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*The opinion is "D" to appellant's separate appendix.

> brought about, (a) the interstate delivery for local erection of substantial quantities of building materials, and (b) the utilization of the completed structure for the receipt, storage and resale of automotive parts manufactured and shipped from other states,
>
> would using violence to get from Goberman the $1,300, the trailer, and the contract release be acts sufficiently connected with that commerce to support the indictment under section 1951? --
>
> that is the question to which attention is invited.
>
> Opinion, Appendix D, at 2-3.

He left this question for later discussion.

2. Post-Trial Discussions About the Charge and Jurisdiction

The colloquy on the charge was concerned with whether the remaining job of incorporating the goods into the building left the goods in interstate commerce* (1882), and whether the defendants' behavior caused the delay. Defense counsel suggested that the second issue was one for the jury (1884), and counsel requested that the jurors be instructed that if they found the goods to be actually delivered to the site and if they found there was no interference with interstate commerce, they might acquit (1890).

---

*It was agreed that all the shipments of materials to the site had been made, and that the question was whether installation was part of interstate commerce.

Referring to Judge Dooling's statement that it seemed to be the law that the issue of affect on commerce was a matter of law (1895), counsel responded:

> We don't want the issue taken from the jury, it is a jurisdictional prerequisite based on facts in the case and our position has been that from the beginning.
>
> ... The request [is] that the jury be told the affectation of the interstate is a jurisdictional prerequisite for this case to come into the Federal Court. If the jury finds there has been no interference with interstate commerce, they must acquit.
>
> (1895-1896).

Judge Dooling then proposed:

> ... if they find that the material was shipped specifically for this job, and had been delivered before, but had not been completely erected before June 28th, then they might find, they may find that there has been an interference with commerce, and then explain, as in the next following sentence; in other words, that would flatly treat delayed installation as part of the sweep of commerce, provided the contract was one to erect the building, and the interference w[a]s with the performance of that contract, and the parts were ordered outside the State, the materials were ordered outside the State, specifically for that building site, and despite the fact that the installation -- well, the shipment was completed, but the installation wasn't completed on the critical days.
>
> Now, that would squarely put it up to the jury....
>
> (1900-1901)
>
> ... [T]he fact that it had not been erected would be enough, provided it had come from out-of-State, and was dedicated to this contract.
>
> (1902).

The Judge explained his theory:

> ... [T]he theory of the Charge is definitely that to interfere with the performance of this contract was an affectation of commerce, because even though most specifically-ordered materials may have been shipped after the impact movements charged in the indictment, there was much still to be done in erecting these materials coming from out of State.
>
> (1904).

Counsel objected to this proposed charge (1902, 1906), and specifically objected

> ... to that part which you state if the material had not been erected by June 28th, as a matter of law the jury may find the establishment [sic] of the owner.
>
> (1915).

The Judge refused to instruct the jurors that they could consider the effect of the stop order (1906).

Counsel again argued that this was really a State assault case, and not one under §1951, and that there was no proof that it was appellant's actions which caused a delay in the construction (1885-1889). The Government argued that it was sufficient under the statute to affect a person engaged in commerce (1889), and that Goberman's removal from commerce was the necessary effect (1889).

Motions for acquittal were made by the defense for failure to prove affectation of interstate commerce and for lack of jurisdiction (1917, 1920, 1924, 1926). The Judge reserved decision on the motions until after the jury rendered its verdict (1119-1920).

3. The Charge*

On the elements of the crime, Judge Dooling charged:

> Accordingly, the first essential element requires you to determine from all the evidence whether you find that the Government has shown that physical violence and threats of physical injury were used to induce Harold Go[b]erm[a]n to sign and deliver the $1,300.00 check on June 5, 1972, or the trailer bill of sale on that day or to sign and deliver the contract cancellation or release on June 28, 1972.
>
> Note particularly that the Government need not prove both episodes. It is enough if it proves beyond a reasonable doubt that on either one of the two occasions physical violence or a threat or injury was used to get on the one occasion either the check or the bill of sale and on the other the contract cancellation.
>
> (2105).
>
> The second essential element requires proof that a conspiracy of two or more persons involving at least one defendant was formed to get the checks or the bill of sale or contract cancellation from Goberman by violence or threats of injury for the purpose of preventing him and HarMac from continuing with the building construction on Nesconset Highway.
>
> (2106).

On the controversial issue, Judge Dooling charged:

> The statute requires proof of a delay, obstruction or some affectation of interstate commerce or of the movement of articles in interstate commerce as a result that would flow naturally from the acts charged.

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*The complete charge is "C" to appellant's separate appendix.

It is not necessary for the Government to show that the defendants or any of them thought about interstate commerce or the shipment of automotive parts or building materials from outside New York to Nesconset Highway or deliberately planned to obstruct or affect it.

But if the very nature of the acts charged would in any manner or degree delay, obstruct or affect commerce, and you find that the persons, if any, whom you find to have conspired did conspire to commit the acts that would have that affect, then the third element is proved.

So here, if you find that the first and second essential elements have been proved beyond a reasonable doubt, and if you further find that (a) automobile parts were regularly being shipped from outside New York to McNamara Buick-Pontiac in Port Jefferson and were to be shipped to the Nesconset Highway site as soon as the new building was completed, or (b) if you find that building materials from outside New York were ordered specifically for the Nesconset Highway job and had to be shipped to the job site for erection as part of the building, and had been delivered to the job but had not been completely erected on the job site by June 28, then as a matter of law you may find that the Government has established the third essential element beyond a reasonable doubt. That is because any interference with the performance of a building contract involving the use of materials ordered and shipped from out of the state specifically for that building and with the identity of the person or company who would complete the contract performance might be found by you in fact in some degree to affect the completion of the building and the time of the shift of deliveries of automotive parts in commerce from Port Jefferson to Nesconset Highway.

(2107-2109).

Counsel renewed his objection to this charge, and to the failure to charge with respect to the effect of the stop order

(2124).

During deliberations, the jurors requested the instructions on the four elements of the crime, and were given copies.

4. The Verdict

Appellant and Thomas McNamara were convicted (2137). John DeLiso and Alphonse ("Fat Nicky") Merolla were acquitted (2137).

Motions for acquittal for lack of jurisdiction were renewed (2140-2141):

> [COUNSEL FOR McNAMARA:] What I was going to do most respectfully is move first for a decision on the motions which your Honor reserved, particularly on the interstate commerce portion of the case.
>
> In addition, I most respectfully move to set aside the verdict as inconsistent with the weight of the evidence against Thomas McNamara.
>
> [COUNSEL FOR MEROLLA:] I would join in that motion on behalf of Alphonse M. Merolla.
>
> THE COURT: Is there anything further you want to do on the reserved motions for judgments of acquittal?
>
> [COUNSEL FOR McNAMARA:] We argued the motions and most of the motions were argued on the aspect of interstate commerce.
>
> Your Honor, when we discussed the charge we excepted to that portion of the charge wherein you Honor gave the affectation of interstate commerce, specifically about the goods being installed. We made motions to the jurisdiction of the Federal Court in this particular matter. And we would move for a judgment of acquittal based upon the evidence being inconsistent with the verdict insofar as the case relies and turns upon the testimony of Harry Goberman.

5. Sentence

At the time of sentence, motions were renewed and summarily denied.

ARGUMENT

Point I

THE JUDGE IMPROPERLY REMOVED THE ISSUE OF CAUSATION FROM THE JURY'S CONSIDERATION, RESULTING IN A VIOLATION OF DUE PROCESS.

The District Court presented this case to the jurors on the ground that if they found (1) violent activity caused Goberman to transfer title to the trailer, to give the defendants $1,300, and to sign the release; (2) that the materials for the site were ordered in interstate commerce but were not installed; and (3) that automotive parts were to be shipped to the new building, then, "as a matter of law you may find" that there was an affect on interstate commerce. The Judge went on to say:

> That is because any interference with the performance of a building contract involving the use of materials ordered and shipped from out of state specifically for that building and with the identity of the person or company who would complete the contract performance might be found by you in fact in some way or degree to affect the

> the completion of the building and the time of the shift of deliveries of automotive parts [to the new building.]

This charge was erroneous because it required the jurors to rely on a presumption that the defendants' conduct produced the result necessary for conviction under the statute. A series of decisions from the Court of Appeals were relied on by the District Court for the proposition that, in a Hobbs Act prosecution, it is a question of law for the judge to decide whether interstate commerce was affected by the defendants' conduct. See, e.g., United States v. Augello, 451 F.2d 1167, 1170 (2d Cir. 1971). Reliance for this proposition is placed on United States v. Hulahan, 214 F.2d 441, 445 (8th Cir.), cert. denied, 348 U.S. 856 (1954). In Hulahan, the court instructed the jurors that if they believed the Government's evidence with respect to bringing materials to the site by interstate commerce, and if they believed the Government's evidence with respect to the defendant's activities, then, as a matter of law, there was a substantial effect on interstate commerce. The Court of Appeals, holding that charge to be correct, stated:

> This instruction amounts to nothing more than a statement that, if the jury believed the evidence of the Government, ... the activities of [the defendant] would necessarily have affected interstate commerce.... We think it was for the court, and not the jury, to determine whether the Government's evidence, if believed, would bring the activities of the defendant within the statute and sustain federal jurisdiction.
>
> Id., 214 F.2d at 445.

The Hulahan reasoning, adopted in Augello, is in conflict with Supreme Court decisions concerning proof as to elements of a crime, and the decisions on application of presumptions.

A. The distinctions between interstate commerce and the affect on that commerce

First, what must be separated is the presence of inter state commerce from the effect of the defendants' behavior on that commerce.* It is the presence of commerce which gives federal authorities jurisdiction, permitting Congress to regulate and the courts to hear a particular case.** However, §1951 requires additionally, as an element of the crime, that the defendants' conduct produce some "affect" on that commerce. Congress' use of the words "obstruct, delay or affect" means that it intended proof of something more than the presence of interstate commerce. Indeed, Congress might have said "whoever extorts property from anyone involved in interstate commerce," but did not say that; thus, the language actually used must be given its appropriate significance. Maze v. United States, 414

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*Not involved in this issue is whether a defendant need know or intend that the consequences of his actions would produce the affect. See United States v. Varlack, 225 F.2d 665 (2d Cir. 1955); United States v. Addonizio, 451 F.2d 49 (7th Cir. 1972); United States v. Caci, 401 F.2d 664, 663 (2d Cir. 1968); United States v. Pranno, 385 F.2d 387 (7th Cir. 1967), cert. denied, 390 U.S. 644 (1968).

**This is the issue Judge Dooling raised at the pre-trial motion.

U.S. 398, 405 (1974); Rewis v. United States, 401 U.S. 808 (1971); United States v. Romano, 382 U.S. 136, 144 (1965); Tot v. United States, 319 U.S. 463, 472 (1943); see also United States v. Bass, 404 U.S. 336, 345, 350 (1971).

Maze illustrates application of the principle. Congress' use of the words use of the mails "for the purpose of" carrying out a fraudulent scheme was held to require that the jury find a mailing which furthered the scheme and was not merely an incident to it. Similarly, the language of the statute involved in Bass was held to require that the jury find that a gun was transported in or affected the commerce.* Thus, here the conduct must produce some result on interstate commerce.

Since causation is an element of the crime included in §1951 (United States v. Stirone, 361 U.S. 212 (1960)), and is a question for the jury,** an instruction which removes that issue from the jury's consideration is erroneous.

This Court's conclusion in Augello that Hulahan's progeny is supportive of the principle articulated in Hulahan is incorrect. In United States v. Green, 246 F.2d 155, 160-161 (7th Cir.), cert. denied, 355 U.S. 871 (1957), while the language of the opinion sustains a Hulahan charge, the instruction given was

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*In several statutes Congress has deliberately elected to exclude the "affect" issue from the burden of proof by making its own findings on that issue and relying for jurisdiction on the mere presence of interstate commerce. Perez v. United States, 402 U.S. 146 (1971); Katzenbach v. McClung, 379 U.S. 241 (1964); United States v. Darby, 312 U.S. 100 (1940). Here Congress did not do that.

**This is distinguished from a finding on the issue of whether interstate commerce exists.

only that if the jury believed the Government's evidence it could find that the road involved was in interstate commerce. There was no charge given on the effect of the conduct upon the commerce.

In United States v. Lowe, 234 F.2d 919 (3d Cir.), cert. denied, 352 U.S. 838 (1956), the Court of Appeals sustained a charge in which the trial judge referred to the testimony concerning the connection of a piece of pipeline with the general distribution of gas. Then the judge said that if the jury accepted this evidence beyond a reasonable doubt, the necessary federal jurisdictional element of interstate commerce was proved. Again, there is no mention of causation in the charge.

The obvious confusion that has been reflected in decisions of this Circuit is trumpeted in United States v. Ricciardi, 357 F.2d 91, 94 (2d Cir.), cert. denied, 384 U.S. 942 (1966), a decision also cited in Augello. In Ricciardi, the Court was dealing with a statute making certain conduct unlawful in an "industry affecting commerce." The Court found that the determination of what was an "industry affecting commerce" was a question of law, but then, in dicta, went on to say that the situation was like that in §1951 cases where the effect of the defendant's conduct on interstate commerce was a question of law. However, the statute in Ricciardi required a showing that the industry itself affected commerce, which is comparable to the finding of interstate commerce in this case. What the Hobbs Act requires in addition is that the defendant's behavior produce the result.

B. Use of an irrefutable presumption to establish an element of the crime as defined by Congress is unconstitutional.

What Hulahan and decisions of this Court have done is set up an irrebuttable presumption with respect to an element of the crime. The presumption is that extortion coupled with the presence of interstate commerce require a per se finding of effect. This results in a violation of due process because it prohibits the jury from considering evidence which may show that the defendant is not guilty.* Screws v. United States, 325 U.S. 91, 107 (1945). The Supreme Court has premised its decisions permitting the use of valid presumptions** on the principle that a presumption, even a statutory one, can be explained away by the defendant's testimony or other evidence in the case, and can be rejected by the jury even if the explanation is not found satisfactory:

> Of course, the mere fact that there is some evidence tending to explain a defendant's possession consistent with innocence does not bar instructing the jury on the inference. The jury must weigh that explanation to determine whether it is "satisfactory." Supra at 840 n.3. The jury is not bound to accept or believe any particular explanation any more than it is bound to accept the cor-

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*In the strictest sense, it would justify precluding the defendant from presenting any evidence on the issue of effect.

**A presumption or inference is valid if there is a rational connection in common experience between the fact proved and the fact presumed. Barnes v. United States, 412 U.S. 837, 841-843 (1973), and the cases cited therein.

> rectness of the inference. But the burden of proving beyond a reasonable doubt that the defendant did have knowledge that the mail was stolen, an essential element of the crime, remains on the Government.
>
> Barnes v. United States, supra, 412 U.S. 837, 845 n. 9 (1973).

See also Barnes v. United States, supra, 412 U.S. at 840 n.3 (the charge approved); Turner v. United States, 396 U.S. 398, 406 n.6 (1970); United States v. Gainey, 380 U.S. 63, 68-70 (1965); United States v. Romano, supra, 382 U.S. at 143; Harris v. United States, 359 U.S. 18, 23 (1959); United States v. Matalon, 425 F.2d 70, 73 (2d Cir. 1970); United States v. Coppola, 424 F.2d 991 (2d Cir. 1970).

C. The charge in this case was erroneous and prejudicial.

By removing from the jury's consideration the disputed issue of whether Goberman's removal from the construction of the building delayed the project, Judge Dooling precluded the jury from considering evidence that the delay was caused by other circumstances. Thus, the jurors were unaware that they could consider the other evidence in the case which concerned Goberman's admitted delays, the defects in the building resulting from his irresponsibility, the time needed to make repairs, the effect of the stop order, or Goberman's refusal to approve a

new contractor.*

Furthermore, the jurors were never told that they might reject the inference or presumption. To the contrary, Judge Dooling's intention was that they accept the presumption without consideration of any of the evidence. The Judge made his intention absolutely clear in the colloquy after presentation of the evidence in response to counsel's request that the jury be instructed to decide the issue of effect.**

The charge here violated the principles discussed above, and deprived appellant of the right to have the jury consider an element of the crime charged. Accordingly, the conviction must be reversed. Screws v. United States, supra.

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*The Judge rejected a request that the jury be told to consider the stop order.

A reading of the record shows that on numerous occasions Judge Dooling tried to hurry counsel as they explored these areas of information in questioning before the jury. He considered this information irrelevant.

**Further, the Government did not prove this element beyond a reasonable doubt. See Point II, infra.

Point II

THE GOVERNMENT FAILED TO PROVE APPELLANT'S GUILT BEYOND A REASONABLE DOUBT, AND THEREFORE IT WAS ERROR TO DENY THE MOTION TO ACQUIT.

A. "Affect" on Commerce

Prior to trial, defense counsel made a motion for dismissal of the indictment urging that it was not the actions of the defendants in removing Goberman from the construction which caused a delay in the project, but that in fact other events caused the delay. In support of the motion, counsel referred to the stop order of the municipality which was posted on June 21, 1972, citing violations of the New York State building code, and a letter of termination sent pursuant to the contract by McNamara to Goberman on June 24, 1972. Judge Dooling denied the motion, stating that the stop order only temporarily prevented construction, and that the letter did not become effective for seven days, i.e., on July 1, 1972. He also referred to the absence of the architect's certificate.

After the completion of the evidence and again after the verdict the motion was renewed. On both occasions it was denied. This decision was erroneous because the Government did not prove beyond a reasonable doubt that the alleged extortionate conduct of the defendants produced the delay in construction of the building. United States v. Taylor, 464 F.2d 240 (2d Cir. 1972).

The Government attempted to prove that the removal of Goberman from the project caused the delay which prevented completion of the building, thereby producing an effect on interstate commerce. The contract required that the building be completed by August 31, 1972. A review of the record reveals that it cannot be said beyond a reasonable doubt that the actions of appellant and the others on June 5 and June 28 caused or might have caused the delay in the construction of the building beyond August 31.

Rather, it was Goberman's behavior which retarded progress on the project. It was agreed that all the products which were to be shipped in interstate commerce were delivered to the site or at least to New York. The question was whether the actions of the defendants delayed incorporation of the materials into the building. Goberman admitted that, beginning in May, he commenced slowing down progress on the job and hired fewer men. The building had major structural defects, including unsupported beams, cracked walls, inadequate cement floors, a leaking roof, and drainage problems. These defects came about while Goberman was the contractor charged under the contract with the responsibility to use his best efforts and sckills (Contract, General Provisions, Article 4.3.1) and to warrant his work as free from defects (General Provisions, Article 4.5.1). As a matter of common sense and logic, these defects had to be repaired before construction of the building could continue.

Further, these structural defects resulted in a prohibition on all construction by the Town of Brookhaven. The site was posted on June 21, 1972, and the record is clear through the testimony of Taibbi and Freda that no construction or repair

work occurred at least through the first week of July. Indeed, the Merkel Electric Company removed its men from the site as a result of the stop order, and thus could not install the outside light poles. The record does not show that there were other installations which were not made prior to June 21, the date of the stop order.

In addition, it was Goberman who refused to approve or comply with the contract provisions for disapproving the new contractor-architect after Thaddeus Lemanski resigned. The record shows that from June 16 through June 29, Goberman failed to respond to this problem even though O'Sullivan, McNamara's lawyer, had requested that he do so.

The record is clear that the activities of appellant and the others on June 5 had no effect -- indeed, could have had no effect -- on the project. According to Goberman, the result of the force used on June 5 was to sign over title to the construction trailer and to give McNamara a check for $1,300. A change of title does not of itself affect interstate commerce. Pennsylvania R.R. v. Clark Bros. Coal Co., 238 U.S. 456, 466 (1915). Further, the record shows that the trailer never left the construction site, and was used for purposes of the project. Indeed, Goberman kept his papers and supplies in the trailer, for the record shows that on June 27, 1972, Taibbi came to get them. The record also shows that the taking of the $1,300 did not, and could not, affect work on the project. While the money was from Goberman's or HarMac's account, it was not construction money.

McNamara himself was paying for the construction in requisitions and advances. Marine Midland Tinker National Bank was his financing agency. Indeed, on that very day McNamara gave Goberman a $32,000 requisition check and an advance to meet his payroll.

The payments made to Goberman on June 5, 15, and 16, and permitting the trailer to remain on the site were perfectly consistent with McNamara's goal of getting the building completed in accord with the contract date, and Goberman's own testimony showed that the conversation on June 5 was directed to urging him to get on with the project.

The record also shows that work continued from June 5 to June 21, the date the property was posted. While the June 28 actions of appellant and the other defendants might have caused Goberman to sign away his rights under the contract, the record shows that it was not Goberman's release, but other events, which delayed the construction beyond August 31, 1972.*

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*What is more, on June 24 McNamara sent a letter to Goberman. The purpose of the letter was to terminate the contract. The letter took effect under terms of the contract (General Provisions, Article 14.2.1) on July 1, 1972. (This was not before the jury). Although the letter did not have the required architect's certificate, that was because there was no architect because of Goberman's own refusal to approve one between June 16 and June 28 and his consequent violation of the contract (General Provisions, Article 15.2) (this was before the jury). This letter was held by the Judge to be irrelevant to the issues because it was not "self-executing." However, the contract itself made the letter self-executing. Thus, as to the letter, the Judge made several errors prejudicial to enabling the defendants to present their defense: he did not explore the legal effect of the failure to secure an architect's certificate when it was caused by "impossibility" of performance, and he did not accord to the letter the appropriate legal im-

Further, it was stipulated that the building was actually used for the sale and repair of cars in September 1972. The record is devoid of any evidence to show that it was intended or could have been used for its proposed purpose before that date. Indeed, it does show that there was no interruption in the flow of cars to McNamara's business. Thus, the Government did not demonstrate that the interstate delivery of automotive parts or automobiles was in any way affected, delayed, or obstructed by Goberman's signing away his rights under the original contract.

B. The Government failed to prove the kind of extortionate behavior which the statute (18 U.S.C. §1951) proscribes.

In United States v. Enmons, 410 U.S. 396 (1973), the Supreme Court held that

> "wrongful" [as it is used in §1951[has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be "wrongful"

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pact -- that of termination of the contract as of July 1.

Since there was no work because of the stop order after June 21, the termination of the contract on July 1 ends all speculation as to whether Goberman's removal from the contract on June 28 affected construction of the building.

> because the alleged extortionish has no lawful claim to that property.
>
> Id., at 400.

In its opinion, the Court explained that the defendants were engaged in a legal strike for higher wages and, in aid of their cause, were involved in the commission of violent acts destroying their employer's property. The Court looked to the history of the statute and found that the wording made clear that the Act did not apply to the use of force to achieve legitimate labor ends such as obtaining higher wages.

The Court noted that the refusal to apply "wrongful" to the ends as well as to the means would broadly expand the scope of the statute:

> [I]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.
>
> Id., 396 U.S. at 411.

Factually, this case is like Enmons: there, the workers wanted higher wages; here, McNamara wanted termination of the contract. In both instances the goal had not yet been achieved, but both were legitimate ends under the circumstances.

Here, the evidence showed that Goberman had violated the contract (General Provisions, Article 4.5.1) by constructing

the building with such defects as to result in the Town of Brookhaven's posting the site.* The stop order notice advised that the building inspector had found that the structure was incapable of safely sustaining its own weight and the loads to which it might have been subject (9(B), N.Y.S.C.R.R., ¶830.1).**

As noted earlier, the testimony at trial showed that the front wall of the building was cracked, that structural beams had been welded to correct mistakes, that structural beams were resting on the walls, that the cinderblocks were cracked, that the cement was too thin, and that the roof leaked, creating drainage problems. These defects necessarily reflect violation of the contract provision requiring that the contractor "use his best skill and attention" to supervise and direct the work (General Provisions, Article 4.3.1), and a breach of the warranty to the owner that "all work will be of good quality, free from faults and defects and in conformance with the contract documents" (General Provisions, Article 4.5.1).

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*The posting was done in accordance with the powers of the municipality to inspect a construction site and require conformance with the State building code. McKinney's, N.Y. Executive Law, §§383 a, b.

**Under the contract McNamara himself could have directed that Goberman stop construction. General Provisions, Article 3.3.1.

In addition, there was evidence before the jury that Goberman had failed to pay subcontractors (General Provisions, Article 5.4.1), including a plumber. Further, by his own admissions, Goberman slowed down the job and cut the number of employees.

On the basis of this evidence, the Judge should have ruled that there was no extortion because McNamara had the right to terminate the contract, and in fact had taken legal steps to do so.

Point III

INSOFAR AS THEY ARE APPLICABLE TO HIS CASE, APPELLANT MEROLLA ADOPTS THE ARGUMENTS RAISED IN THE BRIEF FOR APPELLANT McNAMARA.

CONCLUSION

For the above-stated reasons, the judgment must be reversed and the case remanded to the District Court with the instruction that a judgment of acquittal be entered; or, in the alternative, the case must be remanded for a new trial.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ALPHONSE M. MEROLLA
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

March 21, 1975

CERTIFICATE OF SERVICE

March 21, 1975

I certify that a copy of this brief and appendix has been mailed to each of the following parties:

The Honorable David G. Trager
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Robert H. Plaxico, Esq.
Special Attorney
Criminal Division, Appeals Section
U.S. Department of Justice
Washington, D.C. 20530

Thomas J. Aquilino, Jr., Esq.
DAVIS POLK & WARDWELL
One Chase Manhattan Plaza
New York, New York 10005

Phyllis Skloot Bamberger